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IN THE

SUPREME COURT OF THE UNITED STATES

No. 96-1125

IN RE: INQUIRY OF EVAN W. BROADBELT, J.M.C.

AMICUS CURIAE BRIEF OF
THE THOMAS JEFFERSON CENTER
FOR THE PROTECTION OF FREE EXPRESSION
IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

[Although the Petition for Writ of Certiorari presents two questions for this Court to consider, this brief deals only with the question concerning Petitioner's First Amendment rights.]

Does the New Jersey Supreme Court's prohibition on Petitioner's continued guest appearances on television shows impermissibly infringe upon his First Amendment rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 2

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE IT WILL PROVIDE THIS COURT THE OPPORTUNITY TO ARTICULATE AN APPROPRIATE STANDARD FOR REVIEW OF GOVERNMENT REGULATIONS THAT SPECIFICALLY LIMIT THE SPEECH OF JUDGES 4

A. The status of a judge as a public employee does not remove from the state the heavy burden of demonstrating that limits on judicial speech are consistent with the First Amendment 5

B. Although the principles of this Court's decision in *Pickering v. Board of Educ.* would permit some constraints on judicial speech, such limits must serve substantial government interests in propriety and fairness 6

C. The rationale for a middle-tier level of scrutiny for government limitations of speech by attorneys is inapplicable to regulations effecting a judge's extrajudicial comments 9

II. THE POLICY ON WHICH THE CHALLENGED ORDER RESTS CREATES VIRTUALLY UNFETTERED DISCRETION IN THE REGULATION OF SPEECH 11

III. REFUSAL TO PERMIT A JUDGE TO APPEAR ON COMMERCIAL TELEVISION UNCONSTITUTIONALLY DISCRIMINATES AGAINST A PROTECTED MEDIUM OF COMMUNICATION 12

TABLE OF AUTHORITIES

CASES:	PAGE:
Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342 (1996).	5
Branti v. Finkel, 445 U.S. 507 (1980).	6
Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).	11, 12
Gentile v. Nevada, 501 U.S. 1030 (1991).	9, 10
Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952).	13
Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915).	14
Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).	5, 9, 10
Pickering v. Board of Educ., 391 U.S. 563 (1968).	5, 6, 7, 9
U.S. v. Treasury Employees, 513 U.S. 454 (1995).	5

TABLE OF AUTHORITIES

OTHER AUTHORITIES: **PAGE:**

Mark Scott Bagukla and Judge Robert C. Coates, *Trustees of the Justice System: Quasi-judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617 (1994) 7

Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831 (1995) 7

Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U.L. REV. 549 (1988) 7

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STATEMENT OF INTEREST

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan institution located in Charlottesville, Virginia, and affiliated with the University of Virginia. Devoted solely to the protection of freedoms of speech and press, the Center pursues its mission in a variety of ways including the filing of amicus curiae briefs, providing testimony before legislative bodies on the First Amendment implications of proposed legislation, and sponsoring national conferences on a number of topics relating to free speech.

STATEMENT OF FACTS

Amicus adopts the Statement of Facts submitted in the Petition for Certiorari.

SUMMARY OF ARGUMENT

This case presents an issue of utmost importance both to freedom of expression and to the judicial system of the United States. It is an issue that has yet to come before this Court and on which lower courts are in need of guidance.

The Petitioner has been told that he may not continue to share with television viewers and listeners his special insights on the workings of the courts, especially with regard to pending cases of great interest to the general public. His goal, through years of uncompensated service as a commentator on the legal system, has been to remove some of the mystery and misunderstanding from the courts and their proceedings. His popularity as a commentator suggests he must have been highly effective in that role.

What has been stifled by the judicial decree challenged here is pure speech, not shown to create a clear and present danger or to come within any of the other exceptions this Court has recognized to First Amendment freedoms. Even conceding, as one must, that the speech of judges is appropriately and severely constrained, curbs on their expression must reflect substantial government interests.

Quite different would be, for example, a prohibition on judicial comment concerning a case pending in, or likely to come before, the particular judge's court, or even on cases

pending in other courts within the state. Such a curb would serve to avoid both the risk and the appearance of impropriety, and the risk of any possible threat to the fairness of pending judicial proceedings. The much broader decree imposed in this case goes far beyond serving such interests, and reaches a substantial amount of protected speech that has great societal value.

The decree challenged here raises two additional and related First Amendment concerns. First, the Advisory Committee on Extrajudicial Activities clearly assumed, and exercised, virtually complete discretion. As this Court has repeatedly stated, such discretion creates the potential for discrimination based on the content of one's speech. Second, such discrimination appears to have occurred here because the limitation on Petitioner's speech was based, in part, on the fact it was to take place on commercial television as opposed to non-commercial television.

Such an analysis carries two disturbing implications -- one, that identical comments on public television would have been permissible; the other, that commercial sponsorship, as such, taints the medium and undermines its claim to free expression. The first inference is troubling because it suggests the Advisory Committee's real concern was with the medium and not, as other parts of the order imply, with the message. The second inference -- that commercial sponsorship changes the character of communications for free speech purposes -- violates a half century of this Court's First Amendment jurisprudence.

For these reasons, amicus urges the Court to grant the petition for certiorari.

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE IT WILL PROVIDE THIS COURT THE OPPORTUNITY TO ARTICULATE AN APPROPRIATE STANDARD FOR REVIEW OF GOVERNMENT REGULATIONS THAT SPECIFICALLY LIMIT THE SPEECH OF JUDGES.

At issue in this case is the degree to which a judge's speech may be limited consistent with the First Amendment. No judgments of this Court directly address this issue or provide a specific standard for regulating judicial speech. Review of the New Jersey Supreme Court's opinion in this matter demonstrates that guidance from this Court is needed. In its opinion, the New Jersey Supreme Court lists the various approaches to this issue that other courts have adopted. *In Re: The Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. 501, 517-520, 683 A.2d 543, 551-52 (1996) (Petitioner's Appendix p. 25a-31a). Then, without any explanation as to why one is more "appropriate" than another, the court selects one approach and misapplies it. *Id.* at 519-20, 683 A.2d at 552 (Petitioner's Appendix p. 28a-31a). By granting Petitioner's Motion for Certiorari, this Court would severely reduce the potential for future misapplications in this area, as well as ensure that the speech of judges is accorded an appropriate level of protection.

A. The status of a judge as a public employee does not remove from the state the heavy burden of demonstrating that limits on judicial speech are consistent with the First Amendment.

As with all regulations limiting speech, the standard for assessing a government regulation of a judge's speech should place the burden, not on the judge to prove that his or her speech is protected, but on the government to prove that it is unprotected. *See Nebraska Press Assn v. Stuart*, 427 U.S. 539, 558 (1976). The New Jersey Supreme Court effectively reversed the responsibility for the burden of persuasion by failing to require the state to prove that Petitioner's extrajudicial comments in fact threatened state interests.

The New Jersey Supreme Court properly recognized that a "judge does not relinquish his or her First Amendment rights on ascending to the bench." *In Re: The Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. at 517, 683 A.2d at 551 (Petitioner's Appendix p. 25a). Decisions of this Court make it clear that a judge would not lose the protections of the First Amendment simply because of his status as a government employee. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In reaffirming the principles of *Pickering* last summer, and making clear that their application extends to government contractors (*Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996)), this Court underscored the central role of the First Amendment in the public sector. *See also U.S. v. Treasury Employees*, 513 U.S. 454 (1995).

While *Pickering* and its progeny permit the tailoring of rules to fit the needs of particular positions and relationships within the public service (*e.g.*, *Branti v. Finkel*, 445 U.S. 507 (1980)), basic First Amendment protection applies to all who hold government positions.

B. Although the principles of this Court's decision in *Pickering v. Board of Educ.* would permit some constraints on judicial speech, such limits must serve substantial government interests in propriety and fairness.

Because of a judge's status as a public employee, a strong argument can be made that the *Pickering* test is appropriate for assessing regulations that limit his or her speech. In *Pickering*, this Court articulated a two-prong test for determining the constitutionality of regulations aimed at limiting a public employee's speech. 391 U.S. at 568. First, it must be determined if the public employee's speech addresses a matter of legitimate public concern. If so, it must then be determined whether the employee's right to speak freely outweighs the public employer's interest in regulating the speech to promote the efficiency of the public services it performs. *Id.*

Clearly, Petitioner's comments about judicial proceedings are of legitimate public concern, thus satisfying the first prong of *Pickering*. Indeed, such comments actually promote the public's understanding of the judicial process by explaining legal jargon and de-mystifying courtroom

proceedings. Because judges are involved in both the theoretical and practical applications of the law, they are in fact the most qualified to play the role of public educators. *See* Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U.L. REV. 549, 578 (1988); Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831, 845 (1995). It has even been argued that such commentary by judges is not only desired, but required, in order to fulfill their obligation to maintain public confidence in the judicial system:

> With the overcrowding and underfunding of the court system, the public's perception of the judiciary's ability to dispense quality justice will only decline unless the public understands some details of the constraints under which judges must adjudicate. If judges are to fulfill their duty to maintain public confidence in the legal system, judges must take the forefront in actions to educate the alienated.

Mark Scott Bagukla and Judge Robert C. Coates, *Trustees of the Justice System: Quasi-judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct*, 31 SAN DIEGO L. REV. 617, 637 (1994).

In applying the second prong of *Pickering* to the facts of this case, it becomes clear that the government cannot sustain its burden of demonstrating its interest outweighs Petitioner's speech rights. It is conceded that behind Canons

2 and 3 of the Code of Judicial Conduct lie interests of the greatest importance to the judicial process -- fairness to those who come before the courts, and propriety (both in reality and appearance) of that branch of government which must, above all, sustain citizen trust and confidence. Judges are clearly different from most other persons, even among those who hold public office, in the degree to which they may speak publicly. For example, an obvious and substantial government interest is served by prohibiting a judge from commenting publicly on the merits of a case pending in his or her court, or likely to come before the court. Were such comments allowed, they could certainly erode the public's confidence that, prior to hearing the facts of a case in court, judges are neutral as to the merits of the case.

Yet, the extrajudicial speech in which Petitioner had engaged, and was barred from continuing, was not shown to have jeopardized either fairness or propriety. While a New Jersey judge's televised comments about a case pending in California might hypothetically pose concerns about these interests, the risk is in fact negligible, and this case offers no proof of any risk to either fairness or propriety. Indeed, the permission that Petitioner earlier received for his televised appearances suggests the complete absence of any evidence of a threat to the government's interests.

Certainly, a state may seek to restrain certain types of judicial comment -- for example, with regard to matters pending in that state's courts. Yet, any such restraints must be strictly scrutinized to determine if in fact they serve a

substantial government interest, such as avoiding the risk or even the appearance of impropriety or unfairness. Merely asserting a need to restrain speech, *ipse dixit*, does not under the First Amendment justify the restraint of speech.

C. The rationale for a middle-tier level of scrutiny for government limitations of speech by attorneys is inapplicable to regulations effecting a judge's extrajudicial comments.

Although judges are government employees, the New Jersey Supreme Court without any explanation chose not to apply the *Pickering* test. Rather, the state court looked to this Court's decision in *Gentile v. Nevada*, 501 U.S. 1030 (1991), for guidance and concluded that a "middle-tier" level of scrutiny was all that was required to assess regulations limiting a judge's extrajudicial speech. *In Re: The Inquiry of Evan W. Broadbelt, J.M.C.*, 146 N.J. at 519-20, 683 A.2d at 552 (Petitioner's Appendix p. 28a-31a). *Gentile* was deemed by the New Jersey court to have dealt with a "similar issue" because it involved the regulation of an attorney's speech. *Id.* In *Gentile*, this Court held that the need to ensure fairness in a criminal trial was so great it justified a lower level of scrutiny of regulations affecting a participating attorney's comments about a case. *Gentile*, 501 U.S. at 1074-1076. The more stringent scrutiny of prior restraints of speech articulated in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) was therefore not deemed necessary. *Id.* at 1074.

A careful reading of *Gentile* demonstrates, however, that it involved issues substantially different from those presented in the instant case. In *Gentile*, this Court was explicit in stating that the decision contemplates only "the speech of *those participating before the courts*," *Gentile*, 501 U.S. at 1072 and expressed no opinion "on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made." *Gentile*, 501 U.S. at 1072 n.5. Petitioner's comments never concerned a case pending before him or any other judge in New Jersey. There is no claim that Petitioner's comments in any way threatened the fairness of any litigation pending in New Jersey. The concerns in *Gentile* are simply not present in this case. Neither is the basis for not requiring the strict scrutiny standard of *Nebraska Press* for regulations affecting the extrajudicial speech of judges. If there are other concerns that would warrant application of a *Gentile*-type standard to regulations of judicial speech, they are not to be found in *Gentile* and this Court should grant review of this matter in order to articulate what are those concerns, if any.

II. THE POLICY ON WHICH THE CHALLENGED ORDER RESTS CREATES VIRTUALLY UNFETTERED DISCRETION IN THE REGULATION OF SPEECH.

This Court's decisions make unmistakably clear why unfettered discretion may not be applied to the regulation of expression. *E.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The concern over unfettered discretion in *Forsyth County* and other cases is that, with no guidelines to direct the licensing authority, content-based discrimination may go unchecked. While the discretion this Court has struck down usually involves administrative authority, the exercise of comparable power within the judiciary must be governed by similarly stringent standards.

The existence of such discretion is unmistakable in this case. Indeed, the Supreme Court of New Jersey recognized the breadth of discretion and the lack of guidance provided by the Code when it stated:

> Because our experience is now evolving, we need not attempt to prescribe precise limits for judicial appearances on television programs. We note only that exceptional caution and discretion are essential. We anticipate that the Advisory Committee on Extrajudicial Activities will perform a vital role in formulating standards to govern all such appearances in the future.

In Re: The Inquiry of Evan W. Broadbelt, J.M.C., 146 N.J. at 515-516, 683 A.2d at 550 (Petitioner's Appendix at p.

23a).

If this level of discretion had been given to a licensing authority charged with the granting or denial of parade permits, as in the *Forsyth County* case, there would not be the slightest doubt about the invalidity of the delegation. The standards to guide the exercise of that discretion here are no clearer and, as the following section makes clear, allow for the discrimination against a particular medium of communication. This case thus involves a clear departure from this Court's consistent judgments on the issue of discretion, and for that reason deserves review on the merits.

III. REFUSAL TO PERMIT A JUDGE TO APPEAR ON COMMERCIAL TELEVISION UNCONSTITUTIONALLY DISCRIMINATES AGAINST A PROTECTED MEDIUM OF COMMUNICATION.

The Code provision on which this action rested, in part, commands that "a judge should not lend the prestige of office to advance the private interests of others." *Code of Judicial Conduct*, Canon 2B (Petitioner's Appendix p. 58a-59a). Such a prohibition seems unexceptionable in regard to, for example, judicial endorsement of a commercial product or service. It would presumably be inappropriate for a judge to endorse publicly a particular medium or channel, either print or broadcast. It might also be improper for a judge to appear as a guest on a program the sponsors of which were

involved in litigation before his or her court.

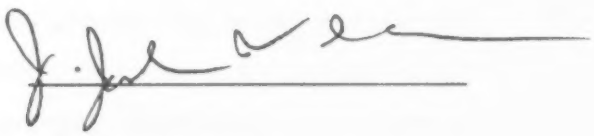
The current situation is, however, a far cry from the type of endorsement to which the code is addressed. Instead, in this case a judge has been told he may not appear on a particular medium, in part because that medium receives sponsorship from commercial sources and, therefore, such an appearance would arguably "advance the private interests of others." That finding carries two deeply troubling implications. On one hand, it strongly suggests that, if the same request came from an otherwise identical program on public television, it would be granted since such an appearance would clearly not "advance commercial television." If that is a correct inference, then the problem seems to be with the medium rather than the message -- a conclusion at variance with the balance of the ruling.

The other inference is even more troubling. The suggestion is that commercial broadcasting may be denied access to substantial expertise of great interest to its viewers and listeners solely because it seeks to make a profit. That is a notion this Court put to rest nearly a half century ago in *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495 (1952) when this Court stated "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. at 501. Ever since, this Court has recognized that the First Amendment extends quite as fully to those media which seek to make a profit as to those which operate on a non-profit basis.

The decision below, for the first time in many years, resurrects a distinction that may once have had some vitality (*see Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915)), but has been so thoroughly discredited that it hardly needs refutation. While there might be times and circumstances when commercial sponsorship would compromise a judge's appearance -- for example, commercials promoting a particular court reporting service or a named bail bondsman -- there is no suggestion here that any such concern entered the judgment. Rather, the New Jersey courts have said, in effect, that whenever a judge appears on a commercially sponsored program of any sort, the integrity of the bench is compromised because "the prestige of office" has been used "to advance the private interests of others." That is a dangerously sweeping inference, and one that does not square with this Court's long-standing view of the mass media.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully urges the Court to grant certiorari in this case, in order to reach the merits of an issue of utmost importance.



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